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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

12 CR 659 (LAK)

5 EVAN ZAUDER,

6 Defendant.

7 -----x
8 New York, N.Y.
9 December 18, 2013
3:00 p.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge
13

14 APPEARANCES

15 PREET BHARARA

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Southern District of New York

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1 THE DEPUTY CLERK: United States v. Evan Zauder.
2 Government, are you ready?

3 MR. MONTELEONI: Yes. Good afternoon, your Honor.
4 Paul Monteleoni for the government.

5 THE COURT: Good afternoon.

6 MR. BRAFMAN: Good afternoon, sir. Benjamin Brafman
7 and Joshua Kirshner for the defendant.

8 THE COURT: Mr. Brafman. When I really began to
9 immerse myself in this material, for which I'm grateful, it
10 becomes very clear that this is not anything approaching an
11 easy sentence from any point of view. So I sent word to you
12 both yesterday that I did not intend to sentence today, but it
13 would be helpful to hear argument. And that probably was
14 viewed as not very helpful of me.

15 So let me tell you some of the things that are on my
16 mind. One thing that's on my mind and that I hope we can
17 address first is to walk through the difference between the
18 probation department's guidelines computation and the
19 government's position, so that I can come to a final view as to
20 what the guidelines recommend before getting into the question
21 of whether and to what extent I ought to apply them.

22 Once we get through that subject, it seems to me it
23 would be useful to talk about what I ought to do in relation to
24 the guideline range, up, down, or sideways.

25 And the third thing I think would be helpful would be

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1 to talk about what I really should make of the psychiatric
2 submissions, which, without meaning to demean anybody, seem
3 filled, to my eye, with an awful lot of jargon.

4 With that guidance, who wants to begin?

5 MR. MONTELEONI: Your Honor, if I may be heard on the
6 guideline computation. That might be the easiest starting
7 point.

8 THE COURT: Yes.

9 MR. MONTELEONI: So, the central issue driving the
10 dispute between the government and the United States probation
11 office with respect to the guideline computation is whether the
12 five-level upward enhancement under Section 2G2.2(b)(5) applies
13 to the child pornography counts. And then following on that
14 there is also a dispute as to whether those two child
15 pornography counts group with count one, the child exploitation
16 count.

17 The probation office's view is that the five-level
18 upward adjustment for the child pornography counts does not
19 apply because it references conduct that is partially accounted
20 for in count one. And it then believes that that conduct
21 should not be considered with respect to counts two and three,
22 because it believes that count one should not group with counts
23 two and three, because they involved different victims.

24 Now, initially, whether or not the counts group, there
25 is the question of whether the Court should decline to apply

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1 the five-level upward adjustment because it has something to do
2 with a different count. And that's simply not a basis for
3 declining to apply an otherwise applicable upward adjustment.

4 As we set forth in our brief, relevant conduct
5 includes a number of factors that are part of the same course
6 of conduct as the offense, but relevant conduct also includes,
7 to the extent not otherwise covered, any other information
8 specified in the applicable guideline.

9 So, the guideline for counts two and three calls for
10 an evaluation of whether the defendant in fact engaged in a
11 pattern of activity involving the sexual abuse or exploitation
12 of a minor.

13 Now, since the guidelines specifically says the Court
14 is to look to that, and the application note says it is to look
15 to whether or not this offense occurred during the course of
16 the commission of the child pornography offense, whether or not
17 there were convictions associated with that offense, and
18 whether or not these multiple incidents of abuse or
19 exploitation of a minor involved the same minor.

20 Since the guideline asks the Court to look at that
21 information, there is no basis for declining to apply that
22 upward adjustment where there is no dispute as to the facts.
23 We believe that the five-level upward adjustment under Section
24 2G2.2(b)(5) is certainly part of the relevant conduct of the
25 child pornography counts, because the definition of "relevant

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1 conduct" specifically says if the guideline asks for it, then
2 that's information that you have to consider.

3 Now, the government does disagree with the probation
4 office as to whether the two counts group. But, if the Court
5 agrees with the government that the enhancement properly
6 applies to the child pornography count, grouping actually is
7 more favorable to the defendant than not grouping. Because if
8 count one did not group with counts two and three, then the
9 defendant might face additional units and a range even higher
10 than that in the plea agreement.

11 The government, however, does not believe that that's
12 the right result. And that's because the provision under which
13 count one groups with counts two and three does not require the
14 two counts to have had the same victim. It says that "wherever
15 conduct involved in one count is a specific offense
16 characteristic with respect to the guidelines applicable to a
17 different count, then they group together." That's to prevent
18 double counting. That's a protection for defendants.

19 THE COURT: This was 3D1.2(c); is that right?

20 MR. MONTELEONI: Exactly. And we believe that the
21 probation office applied the general principle that grouping
22 usually follows where offenses have the same victim, because
23 most of the other grouping provisions do have an explicit
24 provision for the same victim. But Subsection (c) does not.
25 We think that is a meaningful distinction, and also harmonizes

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1 with the facts that the enhancement for count one applies in
2 counts two and three. So it would be double counting not to
3 group them.

4 THE COURT: You say they don't group, and that the
5 guideline range comes out much higher than probation
6 recommends. Specifically 262 to 327, corresponding to an
7 adjusted offense level of 39.

8 MR. MONTELEONI: That is our position, yes.

9 THE COURT: Okay. So Mr. Brafman, what do you have to
10 say to that?

11 MR. BRAFMAN: Your Honor, we worked hard with the
12 government prior to entering into the plea agreement to try and
13 calculate the appropriate guideline range. And to be perfectly
14 candid, I think we did. As much as I would like to say I think
15 we made a mistake and probation got it right, I think I'm bound
16 by the terms of the plea agreement, unless someone were able to
17 persuade me that we made an error that is clear. And I've read
18 the citations and sections cited by probation, and while I
19 don't dispute that a reading of it that way can get them to
20 where they want to be, I can tell you that when we calculated
21 these guidelines, without their input, we both agreed on both
22 sides that the level unfortunately was 39.

23 THE COURT: Well, I spent a fair amount of time
24 yesterday working through this myself. And although I
25 understand where probation is coming from, I'm persuaded that

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1 the government is right on this. I think there is the
2 five-level bump up under 2G2.2(b)(5) with respect to count one.
3 And I think that under 3D1.2(c), that means everything is
4 grouped together and the range is 262 to 327.

5 Now, putting aside the technicality of the guideline
6 computation, we're using the word "group" in an entirely
7 non-technical sense, with one group of pornography counts,
8 namely two and three, and with this enticement sexual abuse
9 count, count one.

10 Or do I have it backwards?

11 MR. MONTELEONI: That's correct.

12 MR. BRAFMAN: That's correct.

13 THE COURT: I have it right. Okay. Now, does
14 everybody agree that if we looked at count one standing alone,
15 the guideline range on count one is 32?

16 MR. BRAFMAN: I agree with that, your Honor.

17 THE COURT: The adjusted offense level.

18 MR. BRAFMAN: Yes.

19 MR. MONTELEONI: Your Honor, I don't have that
20 calculation in front of me. If you want, I can review it.

21 THE COURT: The presentence report does the
22 calculation. I'm not sure you agree with it. It starts at
23 page 14, and it starts with a base offense level of 28. Under
24 2G1.3, there is a two-level bump up for the use of a computer
25 in the enticement, two-level bump up for sexual contact which

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1 gets you to 32. I guess you come back to 29.

2 MR. BRAFMAN: After acceptance.

3 THE COURT: Because of acceptance of responsibility.

4 MR. MONTELEONI: I believe that that would be the
5 calculation if the defendant was only -- if only the count one
6 conduct was relevant conduct.

7 THE COURT: That would be a range of 87 to 108 months.
8 Then if we look at counts two and three, and if we are looking
9 at those without regard to count one, certainly those two
10 counts would be grouped. Right?

11 MR. MONTELEONI: Yes, your Honor.

12 THE COURT: If we look at that, we have the base
13 offense level of 22, plus two for prepubescent minors, plus two
14 for distribution, plus four for sadomasochistic stuff, plus two
15 for computer, and let's say for the sake of argument plus five
16 for the enticement. I suppose it was not charged conduct.
17 That gets us to 37, minus three for acceptance. We would be
18 looking at 34, which would be 151 to 188.

19 Anybody disagree with that?

20 MR. MONTELEONI: Yes, your Honor. I believe that the
21 Court declined to apply the five-level upward adjustment for
22 the number of images under (b)(7)(D).

23 THE COURT: You're right. That would get you to 39.
24 Thank you for that. So 262 to 327.

25 I started looking at it this way a little bit

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1 yesterday, and the question that I had, or certainly one
2 question that I had, was this: If this were purely a
3 pornography case, taking it in the light most favorable to the
4 government, which I add simply to reflect the fact that I'm
5 including on a worst-case basis from the defendant's point of
6 view the five-point bump up in the pornography for enticement.
7 Don't we have a case that comes within Dorvee?

8 MR. BRAFMAN: Judge, if I may. I know we both
9 probably want to be heard.

10 THE COURT: Sure.

11 MR. BRAFMAN: I think it does. And I want to begin by
12 first of all thanking the Court for this opportunity, because
13 this is one of the most difficult sentences I think I've
14 involved myself in in 37 years. And the opportunity to first
15 address the issues before the Court signs off is I think a
16 worthwhile exercise, even though you're right, when I first got
17 the Court's order, I was disappointed because of the anxiety
18 that this increases.

19 THE COURT: I'm very aware of that.

20 MR. BRAFMAN: Yes. But from the getting-it-right
21 perspective, this is a very intelligent way to proceed.

22 I think the government misreads when we cite Dorvee.
23 The government suggests that Dorvee is inapposite because
24 Dorvee did not involve sexual contact. That's not what we cite
25 Dorvee for. We cite it because Dorvee does two things. One

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1 perhaps as important as the other, but one that gets sort of
2 lost.

3 In the Dorvee decision there is an implicit suggestion
4 that we're sort of backing into a number that we feel
5 comfortable with, but nobody really knows what the right number
6 is. We have a mandatory minimum, then you have a chance to go
7 up, can't go below. And how far you go up is fact specific to
8 each case. And Dorvee sort of intimates there is no real
9 guidance for the courts in large measure.

10 What Dorvee then does is give the Court some very
11 important guidance and give us all important guidance when they
12 suggest that what happens under 2G2.2 is that the guidelines
13 shoot up dramatically by virtue of the facts or aspects that
14 are inherent in the core crime itself. To suggest that you get
15 a two-point bump for using a computer when you are using a
16 computer to commit the crime suggests to me double counting.
17 When you say you get a five-point bump because there are 600
18 images, once you start to file share it is almost impossible to
19 control what comes in to your computer. So 600 images is not
20 dramatically high, and yet you get a five-point enhancement.

21 When you get a file share, assume you are interested,
22 as in this case, in only teen-age men, boys. They are minors,
23 but you are not interested in children or very young children.
24 You are not interested in sadomasochistic behavior.

25 Whatever comes into your computer, once you're in this

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1 horrible land, you're stuck with. To the extent that in
2 addition to teen-age boys that you're interested in looking at,
3 something involving a very young child, involved in very
4 offensive behavior, if that comes in, you have it whether you
5 asked for it or not, and you are then saddled with another
6 substantial increase.

7 What ultimately happens, Dorvee explains, is that
8 without any real legitimate -- when I say "legitimate" --
9 without any real statistical reason that would normally apply
10 in a sentencing commission enhancement, you just get bumped by
11 these progressive enhancements that are essentially part of the
12 core crime itself.

13 That's why, in many of the cases that we cited to the
14 Court in our brief, the courts have imposed guideline sentences
15 substantially below. And again, I point out something which I
16 think the government ignores. In each case, it is not only
17 fact specific as to the nature of the crime and the nature of
18 the conduct, but it should also be fact specific as to who the
19 person is who is being sentenced. What other redeeming
20 qualities they may have, other than the fact that they've
21 committed a fairly serious crime. Are they responding well in
22 treatment. Are they in treatment. Have they demonstrated to
23 the Court through acceptance of responsibility that they are
24 getting better, that they do have the ability to recover and
25 one day be productive again.

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1 Then the question which you, sir, ultimately have to
2 decide, is how much prison is necessary. For probation to say
3 we want 168 months, assuming their guidelines is in their own
4 mind correct. And whether it is correct or not, they certainly
5 had the discretion, even at their level, to say we think the
6 higher end of the guidelines is the sentence we recommend.

7 So even if we conclude that their guideline analysis
8 is wrong, what is right is their view that the minimum -- the
9 low end of even that guideline is sufficient. Meaning the
10 independent probation officer has concluded that, given all of
11 the facts that are specific to this defendant, that in their
12 view 168 months, which is 14 years, is sufficient. Which is
13 substantially closer, obviously, to the 10-year mandatory
14 minimum that we are requesting.

15 Also, I think important is the government's
16 acknowledgment that a guideline sentence is not what they are
17 asking for. Implicit in that argument, even though they don't
18 say it anywhere, is they recognize that a guideline sentence
19 would be a draconian sentence.

20 When the government concedes that, what they say,
21 however, is a sentence substantially beyond the mandatory
22 minimum would be appropriate and they give a variety of
23 reasons. I suggest, most respectfully, and I'm happy to
24 discuss this further, is that when you say that, you're
25 essentially telling the judge we don't know what the sentence

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1 should be. We're leaving it to you, sir, to decide what the
2 sentence should be. All they're saying is it should be more
3 than 10. What does "substantially more" mean? Does it mean
4 11, does it mean 16?

5 THE COURT: It depends whether you're asking for it or
6 doing the time.

7 MR. BRAFMAN: I'm sorry?

8 THE COURT: It depends whether you're asking for it or
9 doing the time.

10 MR. BRAFMAN: Correct, sir. When you are doing the
11 time. One of the sad parts of this case, as I've dreaded this
12 day only because of the gravity of the circumstances, not any
13 other reason, as I dreaded this day, I've come to the
14 realization that even if everything works out perfectly, and
15 even if you accept every one of our arguments and agree with me
16 conclusively, I'm still watching a young man who I think has
17 many, very important redeeming qualities, getting a sentence of
18 10 years in prison. That is a very long time.

19 And I think when you look at the cases cited by the
20 government, with respect to sentences that were imposed that
21 are substantially beyond the minimum, many of them involved a
22 serious abuse of trust, many of them involved people with
23 criminal records, many of them involved conduct far more
24 offensive than this case. And yes, some of them don't involve
25 contact.

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1 When we took the plea here, one of the things your
2 Honor asked us to do -- and I am digressing. If you want me to
3 stop, tell me. One of the things your Honor asked us to do is
4 give you some indication of where other judges in this district
5 come out in these cases, and then also what sentence the
6 defendant would face if he had been prosecuted for statutory
7 rape under New Jersey state law, which is essentially the crime
8 of conviction.

9 What is startling to me in this case, and I still
10 can't reconcile it, is that although the count one, the
11 enticement count, is the more serious of the statute because
12 that has the mandatory minimum of 10 years, it is not the
13 statute or the crime that fuels the guidelines. To me that's a
14 terrible irony, which normally doesn't happen. It is normally
15 the most serious crime is what you end up getting substantially
16 punished for.

17 THE COURT: There are those who would argue, and maybe
18 justifiably argue, that it is really the pornography count
19 that's the more serious, because the pornography count involves
20 a very large number of child victims, although there isn't the
21 same personal affront by the defendant to an identifiable
22 victim on the pornography counts.

23 MR. BRAFMAN: I hear that argument. I understand it.
24 But by the same token, the Congress did not impose on you a
25 mandatory minimum that precludes you from giving a sentence

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1 below 10 years, even though if you thought 10 years was
2 appropriate. I hear the argument.

3 What they rely on instead, and what Dorvee suggests is
4 just bad law, what they rely on instead is we give you a
5 mandatory minimum five years, then we build the crime up to
6 life in prison. One of the things Dorvee points out, if you
7 are dealing with a first offender or a serial pornographer,
8 they could both be facing the same sentence. When you're
9 getting into 20, 30 year range in the life of a productive
10 person, you are essentially dealing with a life sentence as a
11 practical matter.

12 And Judge, the thing that I think is missing from the
13 argument -- not from the argument with the Court, but from the
14 argument with the government -- is I commend them for not
15 asking for a guideline sentence. But they have essentially
16 otherwise ignored the fact that this is a young man who had
17 extraordinary promise, extraordinary educational achievements
18 by a very young age, had no incident whatsoever in any job, and
19 even though his jobs involved teaching and supervising
20 thousands of young men over five or six years, not one
21 complaint, not one letter, not one instance of impropriety. So
22 he could obviously separate his illness, if you will, yet keep
23 it cubby holed from his work, which is hard to do.

24 THE COURT: What does Dorvee say about the extent of
25 the deference due to the child pornography guidelines as

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1 opposed to others?

2 MR. BRAFMAN: I think what Dorvee says is you can't
3 lose sight of 3553. And I think they defer it to the Court.
4 And Dorvee, I actually tried a case before Judge McEvoy up in
5 the Northern District who was I think the District Court in the
6 Dorvee case. He's a very, very good judge, and I think a very,
7 very fair judge. I have great respect for him.

8 What Judge McEvoy did, which brought Dorvee up to the
9 Second Circuit, was in the way he imposed sentence he didn't
10 come to a definitive sentencing guideline that he said actually
11 applied. And as a consequence, when he imposed the sentence he
12 did, suggesting that it was well below the guideline, it was an
13 artificial guideline that was wrong. So they sent it back
14 essentially to be resentenced.

15 It is where we end up that we're concerned with, not
16 where we start.

17 However, if a District Court says I'm starting at X,
18 and I think because of certain reasons I'm going to vary down
19 from X. If X is not the correct guideline and if the judge
20 misspoke, you need to go back and say the starting point was
21 really lower, Judge. Because what happened in Dorvee, the
22 judge varied from a higher guideline than the correct
23 guideline. And if you went back and you did that same math
24 over again, I think the defendant there would have earned
25 several years, quite frankly, if the correct guideline had been

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1 the Court's starting point. Now, I think it was a misspeak by
2 the Court. I think clearly that's what seems to have happened.

3 When I read Dorvee, and when I finished reading
4 Dorvee, Dorvee says to me when a Court sentences in a child
5 pornography case, you cannot and should not just apply the
6 enhancements in 2G2.2 because, although we're not striking down
7 that statute, it is clear to us that there is double counting.
8 There is sort of artificial enhancements that make it higher
9 and higher and higher and higher. It is the only way I think I
10 can read Dorvee. I don't think it is binding on the Court so
11 that you cannot apply any of the enhancements on 2G2, but when
12 we just focus, for example, on the use of a computer, inherent
13 in the crime of conviction, you can't do this without file
14 sharing on a computer.

15 So, at the end of the day, Judge, you have very, very
16 wide discretion, I submit, and I say this with great respect
17 for the independence of this. You have great discretion. I
18 think you can start from wherever you deem appropriate in terms
19 of what the guidelines are, but recognize, as in Dorvee, that
20 the guidelines starts at a number where they shouldn't start if
21 we were doing this in the way the sentencing commission was
22 supposed to charter this area. As a result, where you start is
23 so artificially high, that you should end up somewhere
24 substantially lower. How low is really up to the Court.

25 And when the government is not asking for a guideline

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1 sentence, to their credit, I think recognizing that to do so in
2 this case, in this district, would be to fly in the face of
3 Dorvee. I think we then start to do fact-specific inquiries
4 with respect to this case and also this defendant.

5 What I think the government has done in its
6 recommendation is focus exclusively on the facts of the case,
7 and ignored completely the individual who the Court is going to
8 have to sentence.

9 I'm prepared to continue because I have other things I
10 would like to say, but I'll be guided by the Court.

11 THE COURT: Okay. Let me hear from Mr. Monteleoni on
12 the question that I put to Mr. Brafman a few minutes ago.

13 MR. MONTELEONI: Thank you, your Honor.

14 First, I have one or two factual caveats to make to
15 some of the points that Mr. Brafman made with respect to the
16 appropriateness of the quantity enhancement. He described file
17 sharing where a defendant is just stuck with certain images of
18 child pornography. In this case, though, there is some
19 evidence that file sharing was used because there was a folder
20 that was called LimeWire. There is also evidence of direct
21 Skype file transfers, which I believe have to be personally
22 initiated for some volumes of files, certainly not all of the
23 hundreds of them.

24 But I don't think that this is just a case where
25 someone attempts to consume child pornography, does so through

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1 file sharing, and ends up with an anomalously large quantity of
2 child pornography.

3 I think that there is a lot to be said about that case
4 as well, and I'd like to do so. The government agrees that a
5 sentence lower than the guidelines range in this case could be
6 sufficient to achieve the purposes of punishment and therefore
7 should be imposed if the Court agrees with the government. So,
8 in that sense, I think we are already in the range of outcomes
9 that the Second Circuit's remand in Dorvee would have produced,
10 a below-guideline sentence. The government does believe that's
11 appropriate.

12 We don't, however, come to this position just
13 mechanically, just by considering the nature of the offenses,
14 and we don't think the fact that a below-guideline sentence is
15 appropriate in this case means that you just throw out the
16 guidelines and don't let it inform anything. Here's why I
17 think the guidelines are owed a measure of greater deference
18 than that.

19 THE COURT: Greater than throwing them out.

20 MR. MONTELEONI: Yes. The courts have found that
21 Dorvee doesn't apply where the guidelines fall within the
22 combined statutory maxima of all counts run together, and there
23 is a good reason for that which flows from the logic of Dorvee.
24 Part of the reason that the sentence in that case was
25 unreasonable is that the guidelines provided no guidance,

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1 because a guideline sentence would always be simply the top of
2 the statutory range. Not even a range, a single number. And
3 that would be the case, according to the panel in Dorvee, in
4 both the extremely egregious cases and in the less egregious
5 cases. So the guidelines weren't really guiding.

6 In cases like Aumais, however, where the guidelines
7 range is well below the top of the combined statutory maximums,
8 there is room for movement in the range to convey useful
9 information to the judge because that will change the window of
10 sentence that the Court can permissibly impose.

11 So first of all, we think that their failure to be
12 able to signal to the Court is just a factor that doesn't
13 apply, and the Aumais case so held.

14 Additionally, Dorvee was a case not involving actual
15 sexual contact with minors, and the government believes that is
16 an extraordinarily important distinction.

17 THE COURT: Sure. Sure. But, doesn't Dorvee either
18 say or intimate that the child pornography guidelines have been
19 essentially dictated by Congress, have no or little benefit of
20 considered reflection by the sentencing commission, not much in
21 the way of empirical support. Doesn't it also say that?

22 MR. MONTELEONI: Your Honor, it does suggest a
23 preference for the type of empirical data that went in, to an
24 extent, to certain other guidelines.

25 However, if you look at drug guidelines, white collar

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1 guidelines, and pornography guidelines, actually all of them
2 reflect changes that were made in response to changes by
3 Congress, not just an attempt to quantify and average out what
4 courts had been doing previously.

5 In fact, I would say it is really the exception in the
6 most commonly used guidelines for the guidelines to simply just
7 be a summary of what courts were doing before. The sentencing
8 commission has been imposing policy choices, not just in this
9 guideline, but in a number of different guidelines. And though
10 that does limit the empirical foundations of the guideline --

11 THE COURT: You mean the Congress, not the sentencing
12 commission, right?

13 MR. MONTELEONI: Well, it is a complex interplay of
14 both, actually. In the case of the drug guidelines, the
15 sentencing commission made the decision to raise the guidelines
16 so that they didn't create any cliffs with the mandatory
17 minimums that Congress set. So the commission took its cues
18 from Congress.

19 More fundamentally, though, I think that both the
20 commission and Congress are rightly authorized to change, not
21 just reflect, what norms and practices are. White collar
22 guidelines have been increased because of a perception by
23 policy makers that actually, individuals who were engaged in
24 serious crimes would receive insufficient punishment. I think
25 that sexual offenses have undergone something of a change in

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1 norms over time as well.

2 THE COURT: Am I mistaken in understanding Dorvee as
3 suggesting that the child pornography guidelines are different
4 from most others?

5 MR. MONTELEONI: Yes. That's not a mistake. The
6 Second Circuit in Dorvee says that the Section 2G2.2 has an
7 unusual provenance, and unless it is applied with great care,
8 it can result in unreasonable sentences. And the government
9 agrees that this Court should apply it with care.

10 THE COURT: Would it be an unreasonable way in which
11 to view this as to say, look, we've basically got two somewhat
12 different things here. We have the sexual abuse slash
13 enticement count where there is physical contact, the whole
14 package of the elements there. And on that we are at a level
15 29. With respect to the pornography counts, we are at a level
16 39, even giving the government the benefit of the bump up for
17 the sexual contact, which you wouldn't have if you were truly
18 considering the pornography all by itself.

19 Therefore, in light of Dorvee, maybe I shouldn't give
20 as much weight to what the range would be if we had simply a
21 pornography case of the type that we have here, as I give to
22 the guidelines on what the enticement case would be if it stood
23 alone.

24 MR. MONTELEONI: Well, so, I think that there are
25 aspects of what you say that the government agrees with. We

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1 think that Section 2G2.2, the guideline that is driving this
2 outcome, is something that the Second Circuit has said the
3 Court should take great care in applying and not simply do so
4 mechanically, and we don't believe that you should do so
5 mechanically, certainly.

6 One point about if this had been a child pornography
7 case without a conviction on count one, if it had just been the
8 conduct, if it had just been the uncharged conduct with contact
9 with minors constituting the sexual abuse, the level of 39 on
10 just the child pornography counts would be exactly the same as
11 the level 39 that he's facing right now. The offense level set
12 forth in the plea agreement is a total of 39, and that's
13 because they all grouped together, and the contact with
14 children is taken into account in the form of that five-level
15 adjustment.

16 THE COURT: Right. If you had a pure pornography
17 case, an identical pure pornography case, without the contact,
18 you would be at a level 34.

19 MR. MONTELEONI: Yes. That is correct. And it
20 certainly is correct that the guidelines range in this case is
21 driven in part by a number of enhancements that relate to the
22 child pornography conduct that the Second Circuit has said
23 should be viewed with great caution. That's completely true.

24 I do think, though, that there are reasons not to see
25 these two things as completely isolated, and I think they bear

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1 serious consideration.

2 First of all, the contact with minors actually -- it
3 did happen using some of the same mechanisms that the child
4 pornography offenses happened. He was using Skype and he was
5 using it --

6 THE COURT: He was using a computer. Fair enough.
7 Understood. Computer, Internet, whatever. That's the way it's
8 done nowadays.

9 MR. MONTELEONI: Well, that may be. But it may be
10 that what's done nowadays is particularly harmful compared to
11 what was done back then.

12 THE COURT: Look at it from this point of view and
13 then tell me whether you think I'm wrong in looking at it.

14 You've got count one on which, standing alone, you
15 would have a guideline range of 87 to 108, except it slides up
16 to 120 because of the mandatory minimum. So, the defendant on
17 the count one offense is paying a pretty stiff price through
18 the means of the mandatory minimum for the contact, as compared
19 to a comparable guidelines sentence in another case with the
20 identical offense level, right? Sexual contact, Congress says,
21 is very bad. They are entitled to say that; no question about
22 it. And they say whereas somebody who committed a robbery and
23 comes out at offense level 34 gets 87 to 108. Because this is
24 not a robbery, it is sexual contact, mandatory minimum of 120.
25 So there a special price being paid for the sexual contact.

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1 Then you flip over and you look at the pornography
2 count and you say, well, the pornography is much worse because
3 there has been a sexual contact for which a price is already
4 being paid on count one in the form of the increase in the
5 guideline range by virtue of the mandatory minimum as compared
6 to an identically situated, in terms of offense level,
7 offender.

8 You see where I'm coming from?

9 MR. MONTELEONI: I do. I believe I do. I think that
10 your point is that --

11 THE COURT: It is a form of double counting.

12 MR. MONTELEONI: Well, that could be. It could be
13 seen in that way. I think the way the government would prefer
14 the Court to look at it is that actually the range of relevant
15 conduct in this case is actually far greater than the range of
16 charged conduct as set forth in the PSR. Not disputed. There
17 are a number of other contacts. Those contacts form the
18 pattern. Actually if there had just been the count one offense
19 but no other contacts, he wouldn't have even qualified for the
20 five-level upward adjustment, because the five-level upward
21 adjustment requires a pattern. More than one action.

22 THE COURT: I think that's a fair point. I take that
23 point.

24 MR. MONTELEONI: The totality of uncharged but
25 extraordinarily relevant conduct is accounted for in a way by

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1 the guidelines range, and we accept that the guidelines range
2 is the starting point but not the ending point for what the
3 sentence should be.

4 But I think that it also makes sense to consider them
5 together because of the repetitive and pervasive nature of both
6 the pornography offenses, it appears, and the contact offenses.
7 It seems that he was using sort of similar means and mechanism
8 of semi-anonymous contact with strangers related to sexual
9 gratification from children. And in some cases that involved
10 actual contact directly with the minors, either virtually
11 through these webcam sessions or in person through at least one
12 physical in-person encounter, or his participation was somewhat
13 more attenuated participation by creating an incremental amount
14 of demand for these images, though I think that the images
15 themselves often depict extraordinarily -- extraordinarily
16 terrible abuse.

17 And so, it is true that the defendant's responsibility
18 for that is more diffuse than if he had been there personally.
19 What he is connected with is a broader universe of, as the
20 Court says, more victims.

21 We would also add that sadomasochistic enhancement and
22 similar adjustments suggest an extraordinarily depraved level
23 of abuse by the producers.

24 THE COURT: That would all be accounted for if we look
25 at the pornography offense level, assuming it would be

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1 considered separately, which I understand it's not, as being a
2 34, because you've got everything into that except for the
3 contact.

4 MR. MONTELEONI: Well, yes, your Honor. I think that
5 the decision of the commission and Congress that these offenses
6 are similar is made in part on the basis of a belief that the
7 one may lead into the other. And I think if you look at the
8 facts in this case, that's certainly borne out. It is
9 certainly consistent with what happened here, that a growing
10 incremental exposure to this illicit practice of getting sexual
11 gratification from children being sexual, that it went first
12 from the simple consumption and I assume distribution right at
13 the beginning of pornography. Perhaps the distribution came a
14 little later. We don't know all of the facts. And then over
15 time, he moved on to actual contact offenses. I think that
16 pattern is totally consistent with the view that these are
17 actually related.

18 THE COURT: Well, consistent with. But lots of
19 sneezing is consistent with very minor things and very grave
20 illnesses.

21 MR. MONTELEONI: That's true. The standard here is --

22 THE COURT: I'm not making light of what you say, not
23 at all. But "consistent with" is not a phrase that gets me
24 very far.

25 Let me just pass on to this. You're asking for a

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1 sentence substantially more than the mandatory minimum. You
2 are entitled to the mandatory minimum. I have no choice about
3 the mandatory minimum. I am trying to get my arms around
4 where, if anywhere, but the mandatory minimum I ought to go.

5 So, this is obvious from my discussion with you both,
6 that I'm thinking about approaching that -- without having
7 formed a conclusion -- by saying if you look at these two
8 offenses, each standing alone, and the pornography offense,
9 because we're looking at it standing alone, doesn't have the
10 five-level enticement enhancement. We are looking at count
11 one, which is 87 to 108. We are looking at counts two and
12 three, which is 161 to 188.

13 So, subject to one very important qualification, I
14 should maybe really be looking at this as if the guideline
15 range were 87 to 188, and then factoring into this (A) the
16 mandatory minimum; and (B) that whatever enhancement I apply in
17 my own mind, by virtue of the inner relationship between the
18 contact and the pornography, and by virtue of the fact that
19 some of the contact is uncharged, but acknowledged, maybe what
20 I do is, in thinking about where within that 87 to 188 range I
21 go, or if I should go beyond the far end of it, I should think
22 about those two other factors: The mandatory minimum and the
23 pattern of contact.

24 Just in terms of concept, not in terms of numbers,
25 what is your reaction?

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1 MR. MONTELEONI: I think that if the Court were to
2 carry that approach through, one might be guided by the way the
3 guidelines usually account for two different types of conduct,
4 neither of which is a specific offense characteristic of the
5 other, which is to apply the grouping rules.

6 In fact, it would be, as a result of the consideration
7 of the 3553(a) factors, you would arrive -- if the guidelines
8 were written this way -- you would arrive at the range that
9 probation came out with. Because that takes the adjustment off
10 of the child pornography count, but acknowledges that the count
11 one offense itself calls for serious punishment. And the
12 conjunction of the two produces additional units, and thus you
13 would get if this (b)(5) adjustment were not in the guidelines,
14 you would get the probation office's range.

15 THE COURT: That's interesting. That's an awful long
16 way of getting there.

17 MR. MONTELEONI: Well, yes. The government's view is
18 that the range suggested by probation is perhaps somewhat lower
19 than a sentence the government thinks would be fair and
20 appropriate, but not tremendously far off. And the government
21 believes that the guidelines are the guidelines, and they are
22 correctly calculated in the plea agreement as the Court has
23 found.

24 THE COURT: Yes. You've won that battle.

25 MR. BRAFMAN: Judge, can I be heard just for a moment?

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1 THE COURT: You will, not just this second. I just
2 want to hear whatever else Mr. Monteleoni wants to say on this
3 point.

4 MR. MONTELEONI: Yes. Also, I actually do think it is
5 very important to keep in mind this uncharged conduct suggests
6 an extremely pervasive and repetitive course of conduct that
7 just viewing it as, well, what would have happened if he had
8 just met with Minor 1, well, then if the (b)(5) enhancement
9 weren't applied, then you would be at the probation office's
10 range. But in fact there is a lot more than that. And then
11 there is the defendant's bail violation and other factors which
12 the government believes raise a substantial risk of recidivism.
13 So we think that would be a little on the low end.

14 THE COURT: I thank you for that.

15 Mr. Brafman.

16 MR. BRAFMAN: Your Honor, I am going to try to be
17 brief, and I appreciate the Court's indulgence. But some of
18 these issues I think are too important and the Court's inquiry
19 is I think right on point.

20 But what I'm hearing Mr. Monteleoni ultimately back
21 into as a result of I think very pointed questioning by your
22 Honor is he is now I think grudgingly conceding if you sentence
23 Mr. Zauder somewhere in the range of where probation is
24 thinking it should be, that that would be enough to satisfy
25 their request for substantially above the guidelines.

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1 As your Honor suggested earlier, and that's really the
2 telling point, it is not a lot of time extra unless you are the
3 one that's doing it.

4 But let me suggest most respectfully that what I think
5 really is probably more compelling -- there are two things that
6 are very compelling. One is the Court's observation that on
7 the count that is the driving count or should be the driving
8 count, the guidelines would be 87 to 108 months. This is a
9 defendant who is a first offender with an impeccable background
10 and indeed an extraordinary background in many respects. As a
11 result, if you weren't driven by a mandatory minimum, all
12 things being equal, I might have an argument that could
13 convince your Honor to impose a guideline sentence, an 87 to
14 108 guideline sentence, which would still be substantially more
15 than he would get if he pled to this crime in New Jersey where
16 the offense actually occurred.

17 As a result of the mandatory minimum, your Honor
18 correctly notes that you could not even impose the guideline
19 sentence, and he then has to endure a three-level adjustment up
20 just to get to the mandatory minimum.

21 As your Honor notes, because of things separate and
22 apart from the offense of conviction that we're dealing with
23 under count one, he gets a three-year additional sentence than
24 the guidelines for that offense would dictate, which is a
25 substantial upward variance, departure, if you will, that

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1 ordinarily would be a significant increase above the
2 guidelines. Three additional years for someone who has no
3 background.

4 But try as Mr. Monteleoni did, and I think he tried
5 really hard, I must, if I may, read one paragraph from the
6 Dorvee opinion. Because while the opinion is pretty
7 complicated in terms of trying to understand some of the
8 discussion by the court, with all respect to the Second
9 Circuit, the part that isn't difficult to understand at all is
10 the paragraph that appears at 616 F.3d 174, page 14 of the
11 Lexis printout where it says, "An ordinary first-time offender
12 is therefore likely to qualify for a sentence of at least 168
13 to 210 months rapidly approaching the statutory maximum based
14 solely on sentencing enhancements that are all but inherent to
15 the crime of conviction. Consequently, adherence to the
16 guidelines results in virtually no distinction between the
17 sentences for defendants like Dorvee," a first-time offender I
18 might add, "and sentences for the most dangerous offenders who,
19 for example, distribute child pornography for pecuniary gain
20 and who fall in higher criminal history categories. This
21 result is fundamentally incompatible with 3553(a). By
22 concentrating all offenders at or near the statutory maximum,
23 2G2.2 eviscerates the fundamental statutory requirement in
24 3553(a) that district courts consider the nature and
25 circumstances of the offense, and the history and

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1 characteristics of the defendant, and violates the principle
2 reinforced in Gall that the Court must guard against
3 unwarranted disparities among sentences for defendants who have
4 been found guilty of similar conduct." It then goes on to
5 quote from Gall.

6 That is about as clear as I've ever seen from the
7 Second Circuit, and I don't think I've ever seen that type of
8 language with respect to any other series of enhancement
9 statutes.

10 THE COURT: But what distinguishes this case is the
11 contact and the pattern of contact.

12 MR. BRAFMAN: Yes, your Honor.

13 I would just add one thing that I think you cannot
14 overlook and which the government I think overlooks. In our
15 submission, and when you are preparing for sentencing as a
16 serious advocate, you keep rereading the same things over and
17 over again hoping you will see something that you never saw
18 before. To be honest with you, I did. To my chagrin, it
19 suddenly occurred to me how telling this is.

20 In Exhibit 54 to the defendant's initial submission is
21 the diary the defendant maintained after his brother died. As
22 the sentencing memorandum recognizes, the defendant had an
23 older brother Michael who had a genetic disorder and died at
24 the age of 28. He died by the doctors essentially deciding to
25 remove him from what was then life-sustaining equipment,

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1 feeling he would never recover.

2 The defendant is very bitter. At page one of the
3 diary -- this is a diary discovered after the defendant was
4 already remanded, so he couldn't edit it or write it then.
5 This is before he was arrested, before he was remanded. After
6 he was remanded, it was discovered.

7 In substance, the defendant says, he quotes from a
8 portion of the Bible which is the weekly portion of the moment
9 where he talks about the desert. A place of solitude and
10 loneliness describes the new stage to which I now transition.
11 I cannot tell him, Michael, just to chat. I cannot call him
12 just to chat. But how do I make this transition. And then he
13 talks about a lecture he was going to give. If you read --

14 MR. MONTELEONI: I'm sorry.

15 MR. BRAFMAN: I'm sorry. It was not the first page.
16 It doesn't have a date on it. On the top it says -- I'll stand
17 next to you. I'm sorry. It is here on this page.

18 THE COURT: I found it.

19 MR. BRAFMAN: Your Honor, almost on every page in this
20 diary, it is the defendant talking about his abject loneliness
21 and the fact that he terribly misses his brother, and the
22 defendant was the principal caretaker for many years for his
23 brother.

24 Why do I bring that to the Court's attention. I bring
25 it to the Court's attention because from the chronology of

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1 events I think it is important for your Honor to note that the
2 only contact in this case occurred after his brother's death.
3 And it occurred at a time when the defendant was in a period
4 and throes of a terrible, terrible depression. For years he
5 was interested in child pornography. There is no record of any
6 contact prior to the spring of 2010 after his brother dies.
7 And Dr. Krueger, perhaps one of the foremost experts in the
8 field, and I'll get to the final topic in terms of the jargon.

9 THE COURT: We're running out of time.

10 MR. BRAFMAN: I will get to this in one second. On
11 page 14 of his report, which appears as Exhibit 55 of our
12 initial submission, Dr. Krueger notes and considers this an
13 aberration. And says it should be noted that Mr. Zauder
14 reported that his use of pornography, his cyber-sexual
15 behavior, and his sexual interaction with the victim, all
16 occurred after Mr. Zauder's brother had died as Mr. Zauder was
17 grieving. It is not uncommon to see an increase in such
18 sexualized behavior as individuals cope with depression or
19 stress. Then he goes on to say that his risk of recidivism is
20 very, very low.

21 If we're running out of time, I just want to mention
22 one thing to the Court which we submitted in our reply, is a
23 letter from Dr. Krueger on December 15, 2013, which is admitted
24 as Exhibit A.

25 Forget all the jargon. I agree with you, sir, it is

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1 very confusing, all of the different tests that the experts
2 impose and then analyze. You have to be an expert in that
3 field to really grasp it.

4 THE COURT: I'm not even sure that helps.

5 MR. BRAFMAN: I'll tell you, sir, what isn't jargon.
6 Dr. Krueger and Meg Kaplan, Meg Kaplan in particular, spent
7 over 100 hours in therapy with the defendant. Dr. Must, the
8 government's expert, spent two sessions with him. From her
9 sessions with him, using the jargon that your Honor talks
10 about, she concludes based on some tests that he's a moderate
11 risk to reoffend.

12 Dr. Krueger on December 15, when we saw the
13 government's reply, and how they cherrypicked his initial
14 reports. Both Dr. Krueger and Meg Kaplan write to the Court he
15 is in a low risk to reoffend. They cite a study to you, the
16 only authoritative study, which demonstrates that with
17 treatment, and with supervision, which you get after you finish
18 your sentence, Evan Zauder's risk of reoffending is in the
19 fourth percentile. That means that if you impose a 10-year
20 sentence, it is going to be at least another eight and a half
21 years before he even gets under supervision. Which means they
22 can't predict now, Dr. Must cannot predict now for someone she
23 met for a couple of hours, that he's going to reoffend in 10
24 years from now while he's in treatment.

25 The people who have him in treatment, who, by the way,

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1 used to do the reports for the department of probation and are
2 not hacks who just take a check and they write a report. In
3 this area this is about as qualified people as you can find in
4 the United States of America.

5 THE COURT: I've seen a lot of their reports.

6 MR. BRAFMAN: Judge, at the end of the day, it is not
7 a science. I can't give you a blood test and tell you what's
8 going to happen.

9 THE COURT: No question about it.

10 MR. BRAFMAN: You either have to rely on an expert,
11 and I've seen a lot of Dr. Must's reports when she's on the
12 government's side. It is generally not good for the defendant.
13 I'm not suggesting she is going to fabricate a report. This is
14 sort of guesswork. Educated guesswork. All I am saying is we
15 are not asking you to sentence him to time served, let him walk
16 out the door. A 10-year sentence in a real prison is a long
17 punishment.

18 THE COURT: I understand that. We are going to have
19 another session to decide the sentence. But, I'll just let
20 Mr. Monteleoni address the psychiatrist question briefly if he
21 wishes. And then we'll deal with this on another occasion.

22 MR. MONTELEONI: Yes, your Honor. On that occasion
23 will I have the opportunity to be heard on the allegations that
24 we're cherrypicking or not? Or not.

25 THE COURT: Of course you can.

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1 MR. MONTELEONI: So just on the psychiatrist question,
2 then, I completely agree with Mr. Brafman. It is not a
3 science. This isn't a mechanical evaluation. It is also not a
4 mechanical evaluation of résumés. You can't just, as
5 defendant's reply suggested, say this person has these
6 credentials and therefore we have to defer to them in the face
7 of disagreement among them.

8 I think in all cases it requires a careful reading of
9 what they're saying and how consistent it is with an overall
10 pattern.

11 I think that as we set forth in our memo, the pattern
12 that Dr. Must describes of pro-offending attitudes, of a sense
13 of intellectual superiority, and essentially an attitude that
14 he can do this, he can get away with it, is actually
15 unfortunately entirely consistent with the defendant's conduct
16 first in carrying out all of this for a lengthy period of time
17 before he was arrested. It was his first offense in that he
18 didn't get arrested beforehand. But he actually was doing this
19 for quite some time. Second, the defendant's actions in
20 violating his bail conditions after he had been arrested,
21 charged federally, detained for several days while his bond
22 conditions --

23 THE COURT: I thought we were going to talk about the
24 psychiatrist.

25 MR. MONTELEONI: I'm sorry. My point is actually that

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1 these facts are actually very strongly corroborative with
2 Dr. Must's conclusions, and that Dr. Kaplan's responsive letter
3 submitted with the defendant's initial sentencing submission
4 actually kind of acknowledges them, but says, well, they're not
5 that significant. And Dr. Kaplan is certainly entitled to take
6 that view and should be taken seriously, but I think that the
7 Court is entitled to take a different view. I think that's
8 appropriate here.

9 THE COURT: Okay. I thank you both. I'm very glad we
10 did this. It was very helpful to me. I made a lot of progress
11 in my mind. And Andy has given you a date for the sentencing.
12 I'm sorry it is as far out as it is, but I want to give it
13 appropriate thought, and I have other intervening
14 responsibilities that just make me more comfortable putting it
15 into March. There is no question that we have a mandatory
16 minimum, so apart from the uncertainty -- and I don't minimize
17 the significance of that to the defendant -- but the fact of
18 the matter is he's not going anywhere in the next three months.
19 And apart from the uncertainty, I'll be able to give it all the
20 thought I want to give it if I take time. So I will take time.
21 Thank you both.

22 MR. MONTELEONI: Thank you.

23 MR. BRAFMAN: Thank you very much.

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